IN THE SUPREME
COURT OF ALABAMA

NO._____

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WILLIE LIZZLIE GARDNER,

Appellant,

v.

STATE OF ALABAMA,

Appellee.

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On Appeal from the Circuit Court of
Montgomery County (CC-02-732.60),
seeking Writ of Certiorari to the
Alabama Court of Criminal Appeals in
CR-04-0476

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# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ADDRESS OF COUNSEL: PRO SE

WILLIE LIZZLIE GARDNER
AIS# 231984
100 Warrior Lane
Bessemer, Ala. 35023

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

OTHER AUTHORITIES

## STATEMENT OF THE CASE

Mr. Willie Lizzlie Gardner was sentenced to life without parole after proceedings consistent with §13A-5-42, Ala. Code 1975 and the court accepting the plea of guilty. The petitioner was also sentenced on two other charges and received a life sentence for each, (1) first degree robbery, and (2) attempted murder on or about Oct. 23, 2003 in the Montgomery County Circuit Court.

The petitioner filed Rule 32 Petition before the Montgomery Circuit Court Aug. 22, 2004 and the respondents filed their Motion To Dismiss on 7 Oct. 2004, petioner filed Request for Discovery 27 Oct. 2004. The Circuit Court issued order on 15th Nov. 2004 that Rule 32 Petition be dismissed on 14th Dec. 2004 your petitioner filed Notice of Appeal with the Montgomery County Circuit court to appeal such denial to the Alabama Court of Criminal Appeals. The Montgomery County Circuit Court certified the completion of the record on 4th Jan. 2005 and on 10th Jan. your petitioner filed Motion To Supplement the Record. The Alabama Court of Criminal Appeals order the lower court on 11 Feb. 2005 to Supplement the Record on Appeal.

Petitioner filed his brief to the Criminal Court of Appeals 15th March 2005, the respondent filed their brief April 12, 2005 and the petitioner/appellant filed his reply brief 27 April 2005. The Criminal Court of Appeals entered MEMORANDUM, May 20, 2005 affirming the lower courts dismissal of the Rule 32 Petitiuon. On the First day of June your petitioner filed in the Court of Criminal Appeals his Application For Rehearing. Application For Rehearing Overruled June 10, 2005; and this request for cert. follows.

## STATEMENT OF THE ISSUES

ISSUE# I. DID THE CRIMINAL COURT OF APPEALS ERR IN REGARDS TO A MATERIAL QUESTION REQUIRING DECISION OF FIRST IMPRESSION AND WAS INCORRECTLY DECIDED. THE ISSUE IS WHETHER THE APPELLATE COURT ERRRED IN HOLDING THAT, "AS SET OUT ABOVE, THE INDICTMENT NAMED TRAVIS BENEFIELD AS THE VICTIM OF THE INTENTIONAL KILLING. ALSO, THE INDICTMENT CLEARLY STATED THAT GARDNER "USED FORCE AGAINST THE PERSON OF TRAVIS BENEFIELD." FINALLY, THE INDICTMENT STATED ON ITS FACE THAT TRAVIS BENEFIELD WAS A PERSON. AN INDICTMENT IS SUFFICIENT IF IT SUBSTANTIALLY TRACKS THE LANGUAGE OF THE STATUTE, PROVIDED THE STATUTE SETS OUT THE ELEMENTS OF THE OFFENSE."

ISSUE# II. DID THE CRIMINAL COURT OF APPEALS ERR IN REGARDS TO THE APPLICATION OF LAW TO THE SET OF FACTS IN HOLDING THAT, "THE SAME EVIDENCE [OR ELEMENT] TEST OF BLOCKBURGER V. UNITED STATES, 284 U.S. 299 (1932)] IS STATED AS FOLLOWS: 'WHERE THE SAME ACT OR TRANSACTION CONSTITUTES A VIOLATION OF TWO DISTINCT STATUTORY PROVISIONS, THE TEST TO BE APPLIED TO DETERMINE WHETHER THERE ARE TWO OFFENSES OR ONLY ONE IS WHETHER EACH PROVISION REQUIRES PROFF OF AN ADDITIONAL FACT WHICH THE OTHER DOES NOT." BLOCKBURGER, 284 U.S. at 304, 52 S.Ct. at 182.' STATE V. PATTON, 669 So.2d 1002, 1004 (Ala.Crim.App. 1993)."

ISSUE# III. DID THE CRIMINAL COURT OF APPEALS ERR IN REGARDS TO THE APPLICATION OF LAW TO THE SET OF FACTS IN HOLDING THAT, "A PETITION IS 'MERITORIOUS ON ITS FACE ONLY IF IT CONTAINS A CLEAR AND SPECIFIC STATEMENT OF THE GROUNDS UPON WHICH RELIEF IS SOUGHT, INCLUDING FULL DISCLOSURE OF THE FACTS RELIED UPON (AS OPPOSED TO A GENERAL STATEMENT CONCERNING THE NATURE AND EFFECT OF THOSE FACTS) SUFFICIENT TO SHOW THAT THE PETITIONER IS ENTITLED TO RELIEF IF THOSE FACTS ARE TRUE. Ex PARTE BOATWRIGHT, SUPRA, Ex PARTE CHISEY, 501 So.2d 493 (Ala. 1986). HOOKS V. STATE, 502 So.2d 819, 820 (Ala. 1986)."

## STATEMENT OF THE FACTS

The petitioner adopts as his statement of facts submitted to the Criminal Court of Appeals in his "39(K) MOTION" June 1, 2005.

"1. Your appellant was charged by the Montgomery County auhtorities with violation of Alabama Penal Statute §13A-5-40(a)(2) Ala. Code 1975.

2. Your appellant raised the following issue in the Montgomery County Circuit Court at Issue# I:

> "IS THE CHARGING INSTRUMENT "THE INDICTMENT" FATALLY DEFECTIVE FOR FAILURE TO ALLEGE THAT PETITIONER INTENTIONALLY CAUSED THE DEATH OF ANOTHER PERSON."

3. At page 2 of the memorandum opinion incorrectly state what the appellant allegec as his claim, when it stated: "was invalid because, he alleged, it did not specify that he was chargd with the killing of "another human being."

Your appellant alleged that §13A-5-40(a) [illegible]es murder as defined by §13A-6-2(a)(1) applicable to §13A-[illegible]0(a)(2) and that the elements of the charge as framed in words of the statute must be averred in the indictment. The appellant alleges that he must have been charged with the intentional killing of "another Person" as element of murder:

> ""[a] person commits the crime of murder if: (1) With intent to cause the death of another person, he causes the death of that person or of another person..."

§13A-6-2(a)(1) Ala. Code 1975.

Your appellant argued before the court that each of the components murder as defined by §13A-6-2(a)(1) and robbery §13A-8-41, and their elements must stand in the indictment independant

from each other. The court cites no precedence or authority where the robbery elements in a capital murder indictment pursuant to §13A-5-40(a)(2) compensate for the failure of the state to allege the requisite elements of murder.

4. At page 4 of the memorandum opinion incorrectly state what the appellant alleges as his claim, when it stated: "Gardner claims that he was subject to double jeopardy because the capital murder of Travis Benefield and the robbery of Ray Davis arose out of the same incident."

There exist nothing in the record beyond the District Attorney's Motion To Dismiss [R-33,34] that the appellant plead guilty to robbery of Ray Davis! The state implies that the guilty plead was for an offense of robbery against Ray Davis, no where in the Supplemental Record or otherwise does the state show "...the intentional taking of property by force from Ray Davis," as stated in memorandum order at Page 5. as a separate requisite not required to prove in regards to Travis Benefield.

5. At page 5 of the memorandum opinion incorrectly state what the appellant alleges as his claim, when it stated: "Thus, Gardner's claim that his plea was involuntary because he did not know of the lesser-included offense of capital murder..."

At R-26 appellant plead as follows: "In the particular case the attorney failed to advise the defendant that the facts of this case could support the crime of felony murder rather then that of Capital Murder. "....Counsel presented to the petitioner the ABSOLUTE that he would be convicted and sentenced to death if not accept the plea of guilty;" There is no testimony that the

alleged victim Ray Davis was forced to open a safe, there is evidence that appellant only intended to rob the store from state witnesses whom overheard the conversation."

I hereby certify that the foregoing Statement of Facts are the same that was presented to the Alabama Court of Criminal Appeals in Appellant's Application for Rehearing, Rule 39(K) Motion.

DATE: 6/22/05

DECLARANT:

Willie L. Gardner

WILLIE LIZZLIE GARDNER

NOTARY PUBLIC:

Bruce A. White

COMMISSION EXPIRES 10/12/2008

## STATEMENT OF THE STANDARD OF REVIEW

"When the Supreme Court must determine if the trial court misapplied the law to the undisputed facts, the standard of review is de novo, and no presumption of correctness is given the decision of the trial court."

Bean Dredging, L.L.C. v. Alabama Dept. of Revenue, 855 So.2d 513 (Ala. 2003).

## SUMMARY OF THE ARGUMENT

ISSUE# I. DID THE CRIMINAL COURT OF APPEALS ERR IN REGARDS TO A MATERIAL QUESTION REQUIRING DECISION OF FIRST IMPRESSION AND WAS INCORRECTLY DECIDED. THE ISSUE IS WHETHER THE APPELLATE COURT ERRED IN HOLDING THAT, "AS SET OUT ABOVE, THE INDICTMENT NAMED TRAVIS BENEFIELD AS THE VICTIM OF THE INTENTIONAL KILLING. ALSO, THE INDICTMENT CLEARLY STATED THAT GARDNER "USED FORCE AGAINST THE PERSON OF TRAVIS BENEFIELD." FINALLY, THE INDICTMENT STATED ON ITS FACE THAT TRAVIS BENEFIELD WAS A PERSON. AN INDICTMENT IS SUFFICIENT IF IT SUBSTANTIALLY TRACKS THE STATUTE, PROVIDED THE STATUTE SETS OUT THE ELEMENTS OF THE OFFENSE."

The Court of Criminal Appeals has failed to address the would be issue of first impression before the Alabama Supreme Court according to Ala.R.App.Pro., Rule 39(a)(C), where both parties agree that such issue has not been established with law of precedential value in which sets out the law in regards to what are the elements of murder as defined in §13A-6-2(a)(1) that constitutes the offense of murder in Alabama. Yet the appellee implies that we should adopt precedence from other jurisdictions and not examine what the law is in Alabama regarding §13A-6-2(a)(1). Furthermore the Court of Criminal Appeals does not address the question presented by the appellant/petitioner and concludes that the robbery element in the capital murder charge as spelled out in the indictment as to "person" compensates for the state's fail ure to aver in the language of the statute i.e. §13A-6-2(a)(1) "another person" and contrary to the facts of this case concludes that the capital murder indictment substantially tracks the language of the statute.

ISSUE# II. DID THE CRIMINAL COURT OF APPEALS ERR IN REGARDS TO THE APPLICATION OF LAW TO THE SET OF FACTS IN HOLDING THAT, "THE SANE EVIDENCE [OR ELEMENT] TEST OF BLOCKBURGER V. UNITED STATES, 284 U.S. 299 (1932) ] IS STATED AS FOLLOWS: 'WHERE THE SAME ACT OR TRANSACTION CONSTITUTES A VIOLATION OF TWO DISTINCT STATUTORY PROVISIONS, THE TEST TO BE APPLIED TO DETERMINE WHETHER THERE ARE TWO OFFENSE OR ONLY ONE IS WHETHER EACH PROVISION REQUIRES PROFF OF AN ADDITIONAL FACT WHICH THE OTHER DOES NOT." BLOCKBURGER, 284 U.S. at 304, 52 S.Ct. at [illegible] STATE V. [illegible], 669 So.2d 1002, 1004 (Ala.Crim.App. 1993)."

The petitioner raised claims before the trial court that the test of Blockburger v. United States, 284 U.S. 299 (1932) which prohibites conviction that are the result of double jeopardy in regards to his conviction for attempted murder and robbery, to-wit there exist only one robbery which was the underlining component of the capital charge. The petitioner furthers argues before the lower courts that even-though the convictions may have existed there could be only one sentence for the alleged robbery of Ray Davis and alleged attempted murder of Ray Davis! Moreover, your petitioner argues that without the trial court's complying with Rule 14.4(a) and 14.4(b) A.R.CRIM.PRO., both convictions cannot stand nor can the appellate court determine if the trial court's actions suffers from a want of jurisdiction to accept the guilty pleads. Nevertheless the petitioner contends that only the plead for attempted murder could be valid under these set of facts which would involve one sentence not withstanding the erroneous robbery conviction.

ISSUE# III. DID THE CRIMINAL COURT OF APPEALS ERR IN REGARDS TO THE APPLICATION OF LAW TO THE SET OF FACTS IN HOLDING THAT, "A PETITION IS 'MERITORIOUS ON ITS FACE ONLY IF IT CONTAINS A CLEAR AND SPECIFIC STATEMENT OF THE GROUNDS UPON WHICH RELIEF IS SOUGHT, INCLUDING FULL DISCLOSURE OF THE FACTS RELIED UPON (AS OPPOSED TO A GENERAL STATEMENT CONCERNING THE NATURE AND EFFECT OF THOSE FACTS) SUFFICIENT TO SHOW THAT THE PETITIONER IS ENTITLED TO RELIEF IF THOSE FACTS ARE TRUE. EX PARTE BOATWRIGHT, SUPRA E~ PARTE CLISBY, 501 So.2d 483 (Ala. 1986)." MOORE V. STATE, 502 So.2d 819, 820 (Ala. 1986)."

The petitioner has alleged that counsel failed to explain his options at law in regards to the plead of guilty, in misrepresenting the law that he would ABSOLUTELY be convicted of capital murder and executed if proceed to trial. It was counsel's function to inform his client of the options if proceed to trial and not make a jury determination to coerced the plead offer of the state! Your petitioner contends that if counsel had explained that felony murder consisted of a unintended murder during the course of a robbery he would have proceeded to trial! This claim should have received an evidentiary hearing on unrefuted allegations of counsel's failure to inform his client of the relevant law as to the charge of capital murder §13A-5-40(a)(2), where the applicable law would evince a charge if proceed to trial of a lesser included offense of §13A-6-2(a)(3)! Especially where petitioner was not the trigger man and had no intent to commit murder.

## ARGUMENT

ISSUE# I. DID THE CRIMINAL COURT OF APPEALS ERR IN REGARDS TO A MATERIAL QUESTION REQUIRING DECISION OF FIRST IMPRESSION AND WAS INCORRECTLY DECIDED. THE ISSUE IS WHETHER THE APPELLATE COURT ERRED IN HOLDING THAT, "AS SET OUT ABOVE, THE INDICTMENT NAMED TRAVIS BENEFIELD AS THE VICTIM OF THE INTENTIONAL KILLING ALSO, THE INDICTMENT CLEARLY STATED THAT GARDNER "USED FORCE AGAINST THE PERSON OF TRAVIS BENEFIELD." FINALLY, THE INDICTMENT STATED ON ITS FACE THAT TRAVIS BENEFIELD WAS A PERSON. AN INDICTMENT IS SUFFICIENT IF IT SUBSTANTIALLY TRACKS THE LANGUAGE OF THE STATUTE, PROVIDED THE STATUTE SETS OUT THE ELEMENTS OF THE OFFENSE."

The appellee through the Attorney General's Office for the first time in these proceedings in rebuff of the issue urged the Alabama Court of Criminal Appeals to adopt as precedence the persausive authority of other jurisdictions in the interpreting statutory law of Alabama Legislature in interpreting the legislative intent. see Appellee Brief page 18.

The state does not show how such persausive authority was applied to the set of facts in its own province that similar results should issue as an operation of sound judicial determination of legislative intent as to the murder statute in Alabama, §13A-6-2(a)(1), Ala. code 1975.

The judiciary would be constrained by constitutional mandates not to cause usurpation of legislative authority in giving no effect to "words" the legislature in Alabama choose to define the offense of murder! Ex Parte Weaver, 871 So.2d 820 (Ala. 2003):

> "Words in a statute must be given their natural ordinary commonly understood meaning "where plain language is used in a statute, the court is bound to interpret that language to mean exactly what it say."

id. at 821.

The court in its fundamental role must address Alabama Laws as enacted by the legislature of this state and not ignore such in assigning the legislative intert to statutes which would strip the legislature branch of its power converred by the 10th amendment of the United States Constitution upon the states through their legislative branch to enact laws.

The Court of Criminal Appeals for the State of Alabama made an arbitrary ruling in face of prior precedence from this court in the interpretation of statutes and applying the law to the set of facts; which in essenses is an usurpation of the legislative authority in declaring what the law shall be 'to make laws!'

> "To declare what the law is, or has been is a judicial power; to declare what the law shall be is legislative."

Daphne v. City of Spanish Fort, 859 So.2d 435 (Ala. 2003).

The alabama court of Criminal Appeals in a decision of no precedential effect applies laws to the petitioner's claims for relief that supports an indictment that tracks the language of the statute; yet there are no facts that such indictment tracks the essential elements in order for it to substantially comply with the organic law of averments in an indictment. see Poole v. State, 846 So.2d at 394 (Ala.Cr.App. 2001) (quoting

Spooney v. State, 217 Ala. 219, 222-223, 115 So. 308, 312"). Even the precedence to which this court announced in Ex Parte Allred, 393 So.2d 1030 (Ala. 1980) as preceding Harrison v. State, 879 So.2d 594, 605 (Ala.Cr.App. 2003) as relied on by the Alabama Court of Criminal Appeals such case identifies the material elements of the underlying charge and shows how or what it mean in the indictment substantially tracking the language of the statute!

The Criminal Court of Appeals has used the same approach in Harrison, supra herein, and Cogman v. State, 870 So.2d 762, at 765 (Ala.Cr.App. 2003) where the court identifies the essential elements of the offense!

In this case the petitioner has alleged that murder component and robbery component must be averred in indictment collectively yet standing on its own elements 'language' of respective statute; here the Criminal Court of Appeals ruling seeks aid from averments of robbery in the indictment to make out the murder component,

" "Also, the indictment clearly stated that Gardner "used force against the person of Travis Benefield." Finally, the indictment stated on its face that Travis Benefield was a person."

MEMORANDUM OPINION, page 3.

The Court of Criminal Appeals has failed to address the would be issue of first impression before the Alabama Supreme Court according to Ala.R.App.Pro., Rule 39(a)(C), where both parties agree that such issue has not been established with law of precedential value which sets out the law in regards to what are the elements of murder as defined in §13A-6-2(a)(1)

that constitutes the offense of murder in Alabama. Yet the Appellee implies that we should adopt precedence from other jurisdiction and not examine what the law is in Alabama regarding §13A-6-2(a)(1). Furthermore the Court of Criminal Appeals does not address the question presented by the appellant/petitioner and concludes that the robbery element in the capital murder charge as spelled out in the indictment as to " person" compensate for the state's failure to aver in the language of the statute i.e. §13A-6-2(a)(1) "another person" and contrary to the facts of this case concludes that the capital murder indictment substantially tracks the language of the statute.

The present ruling of the Alabama Court of Criminal Appeals displaces the fact that the Alabama Legislature is cognizant of the meaning of "words" used to enact statutes!

> "Court of Appeals presumes that legislature knows meaning of words it uses in enacting legisdlature."

Steward v. State, 730 So.2d 1203 (Ala.Cr.App. 1996).

Not with-standing State v. Hachey, 278 A.2d 397, 398-99 (Me. 1971) as argued in brief of appellee at page 18 and how the Maine Courts applied such to the set of facts in the Maine province; the Alabama Courts acting in its own province must:

> "When a court is called upon to construe a statute, fundamental rule is that the court has a duty to ascertain and effectuate legislative intent expressed in the statute, which may be gleaned from the language used, the reason and the necessity for the act , and the purpose sought to be obtained."

State v. Goldbery, 819 So.2d 123 (Ala.CR.App. 2001).

Title §13A-5-40(a)(2) Ala. code 1975 is Alabama's murder robbery statute which involves the intentional murder and the interntional robbery. In Ex Parte Jackson, 674 So.2d 1365, at 1369 (Ala. 1994) it evince that there must be an intentional murder/intentional robbery!

Historically, the capital murder statute in question became effective July 1, 1980. §13A-5-40, Ala. Code 1975 the present capital murder statute uses "murder" at least 10 times as a component of capital murder. In repealing the prior statutes §13A-5-30 through §13A-5-33, the legislature enacted our present capital murder statutes and at §13A-5-39 as defined therein at Section (5) what murder and murder by the defendant meant referrring to §13A-5-40 "shall be defined as provided in Section 13A-5-40(b)! Section 13A-5-40(b) clearly states that "murder" as used in the capital murder statute "...as used in this section to define capital offenses mean murder as defined in Secton 13A-6-2(a)(1)..."

The Alabama Court of Criminal Appeals has previously distinguished the two components essentially to make out a capital charge:

> "The specific form of conduct that the legislature has declared to be capital offenses 'are set forth in 13A-5-40(Supp. 1993). Each of these offense consist of an intentional murder coupled with some other element."

Ex Parte Coleman, 728 So.2d 703 (Ala.Cr.App. 1998).

Yet in the present case such court chooses to conflate the requisite of averments to the elements of robbery with that of murder in stating:

> "Also, the indictment clearly stated that Gardner "used force against the person of Travis Benefield."

MEMORANDUM OPINION, page 3.

The murder statute in Alabama clearly reads at §13A-6-2(a)(1) as such:

> "A person commits the crime of murder if with the intent to cause the death of another person, he causes the death of that person of of another person;"

The first degree robbery statute clearly reads at §13A-8-41 as such:

> "A person commits the crime of robbery in the first degree if he violates Section 13A-8-43 and he :
> "is armed with a deadly weapon or dangerous instrument; or..."

Section (a)(1).

Section 13A-8-43 reads as follows:

> "A person commits the crime of robbery in the third degree if in the course of committing a theft he:
> (1) use force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or
> "Threatens the imminent use of force against the person of the owner, or any person present with intent to compel acquiescence to the taking of or escaping with the property."

No where does the offense of robbery carries the same elements of murder to be automatically encompassed in the indictment vis-versa.

Your appellant/petitioner argues that the Alabama Legislature intent was that murder be averred in the capital murder indictment independant of robbery and vis-versa and relies on the inference from Ex Parte Jackson, 674 So.2d 1365 (Ala. 1994) and Ex Parte Coleman, 728 So.2d 703 (Ala. 1998) until this court says other.

Prior to the adoption of the new capital murder statute the Alabama Court of Criminal Appeals held in Andrew v. State, 344 So.2d 533 (Ala.Cr.App. 1977) as a jurisdictional requsite the "name" of the alleged victim must be averred in the indictment! Your appellant/petitioner argues that the legislature knew of the prior statute of murder in Alabama and when enacting the new statute §13A-5-40(b) making murder as defined by §13A-6-2(a)(1) applicable to capital murder, setting out the requisite elements that are to be averred in the murder component of the charge of capital murder pursuant to §13A-5-40(a)(2),Andrews, supra does not set out all the elements of murder in Alabama according to the language of the said statute; nor does any precedence of the state, therefore your appellant as premised on the clear 'language' of the murder statute §13A-6-2(a)(1) that "another person" is an essential averment of murder and the the fact that several prosecutors in the State of Alabama has drafted indictments using the 'language' of the 'statute' connoting "another person" with the judicially constructed element as to the "name" of the victim. see Ingram v. State, 779 So.2d 1225 (Ala.Cr.App. 1999), Ex Parte Jordon, 486 So.2d 485 (Ala. 1986), Johnson v. State, 584 So.2d 881, at 883 (Ala.Cr. App. 1991), Dobyne v. State, 672 So.2d 1319, at 1325(Ala.Cr.App.

1994), and McClain v. State, 659 So.2d 161, at 163 (Ala.CR.App. 1994).

All of the above cases came before the appellate courts with indictments drafted by prosecutors in various counties of the State of Alabama which states the 'name' of the victim and identifies them as "another person' setting out the murder averments of the offense of murder according to §13A-6-2(a)(1) in the indictment!

Therefore, this court should establish precedence on this question and grant guidance and relief to the petitioner if his rendition be correct.

ISSUE# II. DID THE CRIMINAL COURT OF APPEALS ERR IN REGARDS TO THE APPLICATION OF LAW TO THE SET OF FACTS IN HOLDING THAT, "THE SAME EVIDENCE [OR ELEMENT] TEST OF BLOCKBURGER V. UNITED STATES, 284 U.S. 299 (1932) ] IS STATED AS FOLLOWS: 'WHERE (A) SAME ACT OR TRANSACTION CONSTITUTES A VIOLATION OF TWO DISTINCT STATUTORY PROVISIONS, THE TEST TO BE APPLIE APPLIED TO DETERMINE WHETHER THERE ARE TWO OFFENSE OR ONLY ONE IS WHETHER EACH PROVISION REQUIRES PROOF OF AN ADDITIONAL FACT WHICH THE OTHER DOES NOT." BLOCKBURGER, 284 U.S. at 304, 52 S.Ct. at 182.' STATE V. PATTON, 669 So.2d 1002, 1004 (Ala.Cr.App. 1993)."

The petitioner raised claims before the trial court that the test of BLOCKBURGER V. UNITED STATES, 284 U.S. 299 (1932) which prohibites convictions that are the result of double jeopardy in regards to his conviction for attempted murder and robbery, to-wit there exist only one robbery which was the underlining component of the capital charge. The petitioner furthers argues before the lower courts that even-though the convictions

argues before the lower courts that even-though the convictions may have existed there could be only one sentence for the alleged robbery of Ray Davis and the alleged attemmpted murder of Ray Davis! Moreover, your petitioner argues that without the trial court's complying with Rule 14.4(a) and 14.4(b) A.R.Crim.Pro., both convictions cannot stand nor can the appellate court determine if the trial court's action suffers from a want of jurisdiction to accept the guilty plead. Nevertheless the petitioner contends that only the plead for attempted murder could be valid under these set of facts which would involve one sentence not withstanding the erroneous robbery conviction.

In view of the facts that are a part of the record there exist no jurisdiction for the Circuit Court of Montgomery County to have accepted the subsequent robbery plea, where the acceptance of the plea to capital murder was predicated on tne same underlying incident. The Supplemental Record shows only 1 (one) robbery in the chain of events. The Robbery of Ray Davis is lacking a factual basis.

> "When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense He may not, however, be convicted of more than one offense if...[o]ne offense is included in the other."

Powell v. State, 854 So.2d 1206, at 1208 (Ala.Cr.App. 2002).

The legislature enacted law pertaining to use of two types of force in connection with offenses:

> "(1) Force. Physical action or threat against another, including confinement."

§13A-3-20(1), Ala. Code 1975.

> "(2) Deadly Physical Force. Force, which under the circumstances in which it is use, is readily capable of causing death or serious physical injury."

§13A-3-20(2), Ala. Code 1975.

Under the applicable law of §13A-5-40(a)(2) you have both in the charge of capital murder as one offense #(1). applicable to the robbery charge/or offense §13-8-41, and #(2). applicable to the murder charge/or offense §13A-6-2(a)(1), which constitutes one offense. The state has choose to argue that it is sufficient to charge petitioner for the consequences of one chain of events where a robbery of Ray Davis is never shown and only evidence that he shot Ray Davis-in Ray Davis resistence to co-operate or comply with instructions from the petitioner.

> "I got back to the office, was trying to get my keys off my side to unlock the door. obviously, I wasn't moving quick enough for his likings, and he discharged the weapon into theground close to my feet. And I said hold on a minute, you know. I got the keys off my side, got the door unlocked. And when I got the door unlocked, I slip-pedinside. And as I was slipping inside, I was shot , got the door closed, couldn't get it to lock. The door was snatched open again and was shot an additional time and finally got the dooor to close, locked the door, picked up the phone and called 911."

TESTIMONY OF RAY DAVIS in the §13A-5-42, proceedings, Supplemental Report page 59.

The petitioner an accomplice to the robberof the store was complete when money and weapons were removed therefrom.

> "Q. Also, not only was money taken from teh Premium Package Store but

> a weapon was taken from the premium package Store? A. Yes, Sir."

SUPPLEMENTAL REPORT AT PAGE 127.

The only feasible charge to which the state could have offered petitioner to plead as to acts against Ray Davis would be attempted murder.

The state could not use the "force" in the shooting of Ray Davis to constitute two offenses of attempted murder and robbery. This rational is supported by, Ex Parte Mckelvey, supra, 630 So.2d at 57 (Ala. 1993), especially according to the Alabama Court of Criminal Appeals enunciation of what must occur to substain a separate conviction against petitioner for robbery of Ray Davis.

> ""...the first degree robbery of Ray Davis required the intentional taking of property by force from Ray Davis, which was not required to prove the capital murder of Travis Benefield."

The appellate erred in failing to realise that the charge of robbery was already a component of the capital murder plead against Travis Benefield and could not be used for the single transaction to support a separate offense of robbery that did not occur.

The respondents in their brief (Brief to the Criminal Court of Appeals) at page 2 states no colloquy of these pleads are in the record, it goes to show there exist a real jurisdiction question as to the trial court accepting the pleas of attempted

murder and robbery evincing a total non-compliance with Rule 14.4(a) and 14.4(b) Ala.R.Crim.Pro., conflicting with its own precedence of Verzone v. State, 841 So.2d 312 (Ala.Cr.App 2002).

ISSUE# III. DID THE CRIMINAL COURT OF APPEALS ERR IN REGARDS TO APPLICATION OF LAW TO THE SET OF FACTS IN HOLDING THAT, "A PETITION IS 'MERITORIOUS ON ITS FACE ONLY IF IT CONTAINS A CLEAR AND SPECIFIC STATEMENT OF THE GROUNDS UPON WHICH RELIEF IS SOUGHT, INCLUD ING FULL DISCLOSURE OF THE FACTS RELIED UPON (AS OPPOSED TO A GENERAL STATEMENT CONCERNING THE NATURE AND EFFECTS OF THOSE FACTS) SUFFICIENT TO SHOW THT THE PETITIONER IS EN TITLED TO RELIEF IF THOSE FACTS ARE TRUE. Ex PARTE BOATWRIGHT, SUPRA EX PARTE CLISBY, 501 So.2d 483 (Ala. 1986)." MOORE V. STATE, 502 So.2d 819, 820 (Ala. 1986)."

The petitioner has alleged that counsel failed to explain his options at law in regards to the plead of guilty. in misrepresenting the law that he would ABSOLUTELY be convicted of capital murder and executed if proceed to trial. It was counsel's function to inform his client of the options if proceed to trial and not make a jury determination to coerced the plead offer of the state! Your petitioner contends that if counsel had explained that felony murder consisted of an unintentional murder during the course of a robbery he would have proceeded to trial! This claim should have received an evidentiary hearing on unrefuted allegations of counsel's failure to inform his client of the relevant law as to the charge of capital murder §13A-5-40(a)(2), where the applicable law would evince a charge if proceed to trial of a lesser included offense of §13A-6-2(a)(3)!

Especially where petitioner was not the trigger man and had no intent to commit murder.

Your petitioner states that counsel did not act as competent adviser of the law in representing to him the ultimatum to go to trial he would ABSOLUTELY be convicted of capital murder an executed.

The options available to petitioner was foreclosed by such representation where petitioner could have proceeded to trial on the defense that he had no intent to cause the death of any one and that he was not the trigger man of the offense charged! If a jury believed his version of the facts supported by the evidence he could have been convicted of felony murder!

> "The question whether a defendant intentional caused the death of another person is a question of fact for the jury Carr v. State, 551 So.2d 1169 (Ala.Cr.App. 1989)."

Ex Parte Carroll, 627 So.2d 874 (Ala. 1993).

In the counsel failure to advise his client he could proceed to trial on the above defense he acted outside of the scope of competent counsel and contrary to applicable law. Scott v. Wainwright, 698 F.2d at 429 (1983).

Although the Criminal Court of Appeals cited valid law on the point subsequently it is applied in an oppressive manner with no regards to established precedence to which guided petitioner in drafting his claim for relief!

> "To prevail on a claim of ineffective assistance of counsel, in connection with guilty plea, petitioner must show that for counsel's errors, he would not have pleaded guilty but would have insisted on proceeding to trial."

ugh v. State, 729 So.2d 359 (Ala.Cr.App. 1998).

Duncan v. State, 722 So.2d 795 (Ala.Cr.App. 1998) makes it applicable simply by practice of counsel that where underlying facts merits a lesser included offense counsel informs his client in the plead negotiations as to implications of proceeding to trial and requesting those instruction to support such a defense. In the event that counsel does not perform such he leaves his client to fend for himself without professional assistance at this critical stage of the proceedings!.

The only way in which the Criminal Court of Appeals could conclude that counsel was not ineffective at a critical stage of the proceeding, is to concure with counsel's rendition of providing the "ABSOLUTE" necessity to plead to his client as competent legal advise of capital murder charges in regards to the law. "...faulty advice is a miscarriage of justice." U.S. v. Scott, 625 F.2d 623 (Ala. 1980). Nevertheless, we have no refuting of these allegations to which is cause for evidentiary hearing! Lane v. State, 786 So.2d 1143 (Ala.Cr.App. 2000).

## CONCLUSION

The Alabama Supreme Court should grant certiorari on the afore-attached merits of the petition, and address the question of first impression and establish precedence on that point of law, as to what are the elements of murder in the State of Alabama and what are the requsite elements that must be averred in an indictment. Second vacate the robbery conviction alleged agianst Ray Davis. And third remand the issue to the Montgomery County Circuit Court for an evidentiary hearing as to the ineffective assistance of counsel issue.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing legal document has been served on the appellee this 24th day June 2005 by placing the same in the United States mail postage prepaid and addressed as follows:

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